APPENDIX A

District Court of Guam, Territory of Guam

Civil Case No. 54–64

ATKINS, KROLL (GUAM), LTD., A CORPORATION, PLAINTIFF

v.

GOVERNMENT OF GUAM, DEFENDENT

(Filed, District Court of Guam, Agana, Guam, November 30, 1964)

MEMORANDUM OF LAW AND JUDGMENT

The plaintiff, Atkins, Kroll (Guam), Ltd., is a corporation organized and existing under the laws of Guam. All of its stock, except qualifying shares, is owned by Atkins, Kroll and Company, Ltd., a corporation organized and existing under the laws of California with its principal office in San Francisco. In 1958 the plaintiff paid a dividend in the amount of $25,000 to the parent corporaton and the defendant, government of Guam, required the payment of thirty percent of such dividend, or $7500, as an income tax on dividends paid to a foreign corporation. The plaintiff paid such sum and now seeks its recovery. The Court has jurisdiction under the Organic Act of Guam, as amended, 48 U.S.C.A. 1421i(h)(1).

The parties stipulated at pre-trial that the question presented should be determined by the Court on the basis of briefs, but in its reply brief the defendant introduced factual and extraneous material. The

plaintiff moved to strike but the Court denied the motion upon the basis that the Court did not consider that such factual allegations affected in any way the basic issue involved and would not be considered by the Court. The plaintiff informed the Court that no further brief would be filed by the plaintiff.

The basic question is whether dividends paid by a Guam corporation to a California corporation, not doing business in Guam, are subject to the thirty percent withholding, at source, on the same basis as those paid by a California corporation to a Guam corporation.

The Guam income tax is a territorial tax measured by the United States income tax, Laguana v. Ansell, 102 F. Supp. 919, affirmed 212 F. 2d 207, cer. den. 75 S. Ct. 51, 348 U.S. 830, 99 L. Ed. 654. The tax in dispute here is governed by Sections 1441 and 1442, Internal Revenue Code 1954. It was held, Rev. Rule 56–616, that income items specified in section 1441(b) of such Code, payable to a Guamanian corporation not engaged in trade or business within the United States, are subject to the withholding tax provision of section 1442 of the Code. Even before the clarifying amendment to the Organic Act of Guam, Act of Aug. 20, 1958, Sec. 1, 72 Stat. 681, 48 U.S.C.A. 1421i, the courts recognized that in applying the Guam income tax it was necessary to adopt the so-called "mirror reading" principle. The law now reads

> (e) In applying as the Guam Territorial income tax the income tax laws in force in Guam pursuant to subsection (a) of this section, except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Code of 1954 and 1939, shall be read so as to substitute 'Guam' for 'United States', 'Governor or his delegate' for 'Secretary or his delegate', 'Governor or his delegate'

> for 'Commissioner of Internal Revenue' and 'Collector of Internal Revenue,' 'District Court of Guam' for 'district court' and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section.

Under this reading a Guam corporation becomes a domestic corporation and a California corporation becomes a foreign corporation for Guam income tax purposes. It follows that the defendant properly required the payment of the thirty percent tax, or $7500, and judgment is herewith entered for the defendant.

Dated at Agana, Guam, this 30th day of November, A. D. 1964.

(s) Paul D. Shriver,
PAUL D. SHRIVER, *Judge.*

United States Court of Appeals, Ninth Circuit

September 30, 1966

No. 19915.

ATKINS-KROLL (GUAM) LTD., A CORPORATION
APPELLANT

v.

GOVERNMENT OF GUAM, APPELLEE

Before HAMLEY, JERTBERG and ELY, *Circuit Judges.*

JERTBERG, *Circuit Judge:* Appellant, Atkins-Kroll (Guam, Ltd., hereinafter Kroll (Guam, is a corporation organized and existing under the laws of the Territory of Guam. All of its capital stock, except for qualifying shares, is owned by Atkins, Kroll and Company, Ltd., hereinafter Atkins Kroll, which is a corporation organized and existing under the laws of

the State of California, with its principal place of business at San Francisco. It is not engaged in trade or business in Guam.

The appeal involves a claim for refund by Kroll (Guam) with respect to the withholding tax on dividends paid by it to Atkins Kroll.

The facts upon which the District Court denied the claim for refund are entirely stipulated. The pre-trial order entered in that court states:

> No question of fact is presented and the parties have stipulated that the question involved shall be determined by the court as a question of law.

The stipulated facts are: In 1958, Kroll (Guam) declared and paid to Atkins Kroll a cash dividend of $25,000. The Government of Guam asserted that Kroll (Guam) was required by the Guam Revenue Laws, Sections 881 and 1442, to withhold 30 per cent of the sum paid as a dividend on the ground that Atkins Kroll was a foreign corporation not engaged in trade or business in Guam and assessed the sum of $7,500. Kroll (Guam) paid said sum to appellee and filed a claim for refund of such payment. Appellee took no formal action on the claim, whereupon Kroll (Guam) instituted this action in the District Court for refund of the $7,500, plus interest.

The District Court held that appellee properly required the payment of the tax of $7,500 and entered judgment denying a refund to Kroll (Guam).

Section 31 of the Organic Act of Guam, 64 Stat. 392 (1950), as amended in 1958, 72 Stat. 681 (1958), in parts here relevant [48 U.S.C. 1421i (a), (b), (d), and (e)], provides:

> SECTION 1421i. INCOME TAX.
>
> (a) Applicability of Federal laws. The income-tax laws in force in the United States

of America and those which hereafter may be enacted shall be held to be likewise in force in Guam.

(b) The income-tax laws in force in Guam pursuant to subsection (a) shall be deemed to impose a separate Territorial income tax, payable to the Government of Guam, which tax is designated the "Guam Territorial income tax."

(d) The income-tax laws in force in Guam include, but are not limited to the following provisions of the Internal Revenue Code of 1954, where not manifestly inapplicable or incompatible with the intent of this section: Subtitle A (not including Chapter 2 and section 931).[1]

(e) Substitution of terms. In applying as the Guam Territorial income-tax the income tax laws in force in Guam, except where otherwise manifestly required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute "Guam" for "United States" and with other changes in nomenclature and other language, including the omissions of inapplicable language where necessary to effect the intent of this section.

Section 881 of the Internal Revenue Code of 1954 imposes on a foreign corporation not engaged in trade or business in the United States a tax of 30 per cent of the amount received from sources within the United States as dividends. As a means of collecting the tax, Section 1442 of the Internal Revenue Code of 1954 requires a corporation which pays a dividend to a foreign corporation not engaged in trade or business in the United States to withhold and pay over an amount equal to 30 percent of the dividends. The amount so withheld and paid over

[1] Subtitle A pertains to income taxes.

is allowed as a credit against a tax imposed by Section 881 as provided by Section 1462 of the Internal Revenue Code of 1954.

Under the heading "Definitions", Section 7701 of the Internal Revenue Code of 1954 provides in pertinent part:

> (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—
>
> (4) DOMESTIC. The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State or Territory.
>
> (5) FOREIGN. The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.
>
> (9) UNITED STATES. The term "United States" when used in a geographical sense includes only the States and the District of Columbia.
>
> (10) STATE. The term "State" shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title.

By substituting "Guam" for "United States", as directed in subsection (e) of Section 1421i of the Organic Act of Guam, such sections in pertinent parts read as follows:

> SECTION 881. In the case of every foreign corporation not engaged in trade or business within Guam, there is hereby imposed for each taxable year a tax of 30 per cent of the amount received from sources within Guam as dividends.
>
> SECTION 1442. In the case of a foreign corporation subject to taxation under this subtitle not engaged in trade or business within Guam, there shall be deducted and withheld at the source in the same manner and on the same

> items of income as provided in Section 1441 or Section 1451 a tax equal to 30 per cent thereof, and the deduction and withholding shall be at the rate specified therein.

The problem of substitution arises in connection with Section 7701 of the Internal Revenue Code of 1954. It is appellee's position that "Guam" should be substituted for "United States" in the definition of "Domestic" in each of the two places where "United States" is used in subsection (a)(4) of 7701. Appellee would recast subsection (a)(4) of 7701 to read as follows:

> "(4) DOMESTIC. The term 'domestic' when applied to a corporation or partnership means created or organized in Guam or under the law of Guam."

Appellee would thus excise from the definition the phrase "or of any State or Territory" as being inapplicable language.

It is appellant's position that "Guam" should be substituted for "United States" in only the first place where it appears in the definition.

In our view we see no reason why the last phrase in the definition "or of any State or Territory" should be disregarded and under such view it makes no difference whether "Guam" is substituted for "United States" in one or both places where "United States" appears in the definition since the phrase "or of any State or Terriitory" preserves Atkins Kroll as a domestic corporation since it was organized in a state of the United States, to-wit, the State of California. In holding that the phrase "or of any State or Territory" preserves a California corporation as a domestic corporation, even assuming that "Guam" should be substituted for "United States" in both places in the definition, we do so only for the purposes of Section 881, as it may well be that for the purposes of other

provisions of the Guam income tax laws, the words "or of any State or Territory" would have to be disregarded pursuant to the statutory authority conveyed by the words "except where it is manifestly otherwise required." A reason for not following the latter course with respect to Section 881 lies in the fact that with respect to that section, unless the words "or of any State or Territory" are given full application, a manifest and substantial inequity results, for otherwise the combined Guam and Federal tax burden on the income which a California corporation ultimately receives from the business of its Guam subsidiary substantially exceeds the applicable corporate income tax rate under either the laws of Guam or the United States. We find nothing to indicate that Congress intended the Guam tax laws to be interpreted so as to reach such a result.

The District Court erred in concluding that Atkins Kroll is a foreign corporation under Guam tax laws.

We deem it unnecessary to reach other contentions appearing in the briefs.

The judgment of the District Court is reversed.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,915

ATKINS-KROLL (GUAM) LTD., A CORPORATION, APPELLANT

v.

GOVERNMENT OF GUAM, APPELLEE

APPEAL from the United States District Court for the District of Guam.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Guam and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with costs in this Court in favor of the appelland and against the appellee.

Costs:

Docket Fee	$25.00
Printing record	104.57
Total	129.57

Filed and entered September 30, 1966.

APPENDIX B

Internal Revenue Code of 1954 (26 U.S.C.):[1]

SEC. 11. TAX IMPOSED.

(a) *Corporations In General.*—A tax is hereby imposed for each taxable year on the taxable income of every corporation.

* * * * *

(d) *Exceptions.*—Subsection (a) shall not apply to a corporation subject to a tax imposed by—

* * * * *

(4) section 881(a) (relating to foreign corporations not engaged in business in United States).[2]

SEC. 881. TAX ON FOREIGN CORPORATIONS NOT ENGAGED IN BUSINESS IN UNITED STATES.

(a) *Imposition of Tax.*—In the case of every foreign corporation not engaged in trade or business within the United States, there is hereby imposed for each taxable year, in lieu of the taxes imposed by section 11, a tax of 30 percent of the amount received from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other

[1] The Foreign Investors Tax Act of 1966, P.L. 89-809, 80 Stat. 1539, altered in some respects the language of most of the sections quoted herein, but, except as otherwise stated herein, the changes are not substantial for purposes of the instant case.

[2] The Foreign Investors Tax Act of 1966, *supra* (Section 104(b)(2)(B)), renumbered and amended § 11(d)(4) to read as follows:

SEC. 11(f) *Foreign Corporations.*—In the case of a foreign corporation, the tax imposed by subsection (a) shall apply only as provided by section 882.

fixed or determinable annual or periodical gains, profits, and income (including amounts described in section 631 (b) and (c) which are considered to be gains from the sale or exchange of capital assets).

* * * * *

SEC. 882. TAX ON RESIDENT FOREIGN CORPORATIONS.

(a) *Imposition of Tax.*—A foreign corporation engaged in trade or business within the United States shall be taxable as provided in section 11.

(b) *Gross Income.*—In the case of a foreign corporation, gross income includes only the gross income from sources within the United States.

SEC. 1442. WITHHOLDING OF TAX ON FOREIGN CORPORATIONS.

In the case of foreign corporations subject to taxation under this subtitle not engaged in trade or business within the United States, there shall be deducted and withheld at the source in the same manner and on the same items of income as is provided in section 1441 or section 1451 a tax equal to 30 percent thereof; except that, in the case of interest described in section 1451 (relating to tax-free covenant bonds), the deduction and withholding shall be at the rate specified therein.

SEC. 7701. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(4) *Domestic.*—The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State or Territory.

(5) *Foreign.*—The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.

* * * * *

Organic Act of Guam, c. 512, 64 Stat. 384:

Sec. 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

[48 U.S.C. 1952 ed., Sec. 1421i.]

Sec. 31 [as amended by Sec. 1, Act of August 20, 1958, P.L. 85–688, 72 Stat. 681].

(a) The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

(b) The income-tax laws in force in Guam pursuant to subsection. (a) of this section shall be deemed to impose a separate Territorial income tax, payable to the government of Guam, which tax is designated the "Guam Territorial income tax".

(c) The administration and enforcement of the Guam Territorial income tax shall be performed by or under the supervision of the Governor. Any function needful to the administration and enforcement of the income-tax laws in force in Guam pursuant to subsection (a) of this section shall be performed by any officer or employee of the government of Guam duly authorized by the Governor (either directly, or indirectly by one or more redelegations of authority) to perform such function.

(d) (1) The income-tax laws in force in Guam pursuant to subsection (a) of this section include but are not limited to the following provisions of the Internal Revenue Code of 1954, where not manifestly inapplicable or incompatible with the intent

of this section: Subtitle A (not including chapter 2 and section 931); chapters 24 and 25 of subtitle C, with reference to the collection of income tax at source on wages; and all provisions of subtitle F which apply to the income tax, including provisions as to crimes, other offenses, and forfeitures contained in chapter 75. For the period after 1950 and prior to the effective date of the repeal of any provision of the Internal Revenue Code of 1939 which corresponds to one or more of those provisions of the Internal Revenue Code of 1954 which are included in the income-tax laws in force in Guam pursuant to subsection (a) of this section, such income-tax laws include but are not limited to such provisions of the Internal Revenue Code of 1939.

(2) The Governor or his delegate shall have the same administrative and enforcement powers and remedies with regard to the Guam Territorial income tax as the Secretary of the Treasury, and other United States officials of the executive branch, have with respect to the United States income tax. Needful rules and regulations for enforcement of the Guam Territorial income tax shall be prescribed by the Governor. The Governor or his delegate shall have the authority to issue, from time to time, in whole or in part, the text of the income-tax laws in force in Guam pursuant to subsection (a) of this section.

(e) In applying as the Guam Territorial income tax the income-tax laws in force in Guam pursuant to subsection (a) of this section, except where it is manifestly otherwise required, the applicable provisions of of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute "Guam" for "United States", "Governor or his delegate" for "Secretary or his dele-

gate", "Governor or his delegate" for "Commissioner of Internal Revenue" and "Collector of Internal Revenue", "District Court of Guam" for "district court" and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section.

* * * * *

(h) (1) Notwithstanding any provision of section 22 of this Act or any other provision of law to the contrary, the District Court of Guam shall have exclusive original jurisdiction over all judicial proceedings in Guam, both criminal and civil, regardless of the degree of the offense or of the amount involved, with respect to the Guam Territorial income tax.

(2) Suits for the recovery of any Guam Territorial income tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, under the income-tax laws in force in Guam, pursuant to subsection (a) of this section, may, regardless of the amount of claim, be maintained against the government of Guam subject to the same statutory requirements as are applicable to suits for the recovery of such amounts maintained against the United States in the United States district courts with respect to the United States income tax. When any judgment against the government of Guam under this paragraph has become final, the Governor shall order the payment of such judgments out of any unencumbered funds in the treasury of Guam.

* * * * *

(4) A civil action for the collection of the Guam Territorial income tax, together with fines, penalties, and forfeitures, or for the recovery of any erroneous refund of such tax, may be brought in the name of and by the government of Guam in the District Court of Guam or in any district court of the United States or in any court having the jurisdiction of a district court of the United States.

[48 U.S.C., Sec. 1421i]

U.S. GOVERNMENT PRINTING OFFICE: 1967